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SERVICE DATE - JUNE 26, 2000

SURFACE TRANSPORTATION BOARD<sup>1</sup>

DECISION

Finance Docket No. 32479

CADDO ANTOINE AND LITTLE MISSOURI RAILROAD COMPANY  
—FEEDER LINE ACQUISITION—  
ARKANSAS MIDLAND RAILROAD COMPANY LINE  
BETWEEN GURDON AND BIRDS MILL, AR

Decided: June 22, 2000

This decision denies a petition by Arkansas Midland Railroad Company (AMR) seeking to stay the closing date of this transaction pending judicial review of the Board's decision served May 5, 2000 (the May 2000 Decision)<sup>2</sup> setting the purchase price of AMR's 52-mile Norman Branch rail line between Gurdon and Birds Mill, AR, under the feeder line provisions of 49 U.S.C. 10907.<sup>3</sup>

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<sup>1</sup> The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 83 (ICCTA), abolished the ICC and transferred certain functions and proceedings to the Board, including the feeder line functions at issue here, which are now found at 49 U.S.C. 10907, effective January 1, 1996. Section 204(c) of ICCTA provides that where, as here, a court remands a suit against the ICC that was pending on the date of that legislation and involves functions retained by the ICCTA, subsequent proceedings related to the case shall proceed under the applicable law and regulations in effect at the time of the subsequent proceedings.

<sup>2</sup> Petitions for judicial review of the May 2000 Decision currently are pending in two courts, in Arkansas Midland Railroad Co. v. STB, No. 00-1206 (D.C. Cir. filed May 15, 2000) and GS Roofing, Et Al. v. STB, No. 00-2213 (8th Cir. filed May 15, 2000). AMR has filed a motion in the D.C. Circuit to transfer to the Eighth Circuit the petition that was filed in the D.C. Circuit.

<sup>3</sup> In addition to setting the purchase price for the entire Norman Branch in Finance Docket No. 32479, the May 2000 Decision set compensation for trackage rights over part of the Norman Branch in Finance Docket No. 32625, Dardanelle & Russellville R. Co. -- Trackage Rights Compensation—Arkansas Midland R. Co. Moreover, the May 2000 Decision awarded damages to compensate two shippers for an unlawful embargo of rail service on portions of the line in Docket No. 41230, GS Roofing Products Co., Inc., Beazer West, Inc., D/B/A/ Gifford Hill & Co., Bean Lumber Co. & Curt Bean Lumber Co. v. Arkansas Midland Railroad Co. & Pinsly R. Co., Inc. This stay request relates only to the feeder line valuation issues in Finance Docket (continued...)

## PERTINENT BACKGROUND

In a decision served August 12, 1999 (the August 1999 Decision), the Board approved an application to purchase AMR's Norman Branch line under the feeder line provisions of 49 U.S.C. 10907 by the shippers located on the northern portion of the line. The shippers are: GS Roofing Products Company, Inc., Hanson Aggregates West, Inc. f/k/a Gifford-Hill & Company, Bean Lumber Company and Curt Bean Lumber Company, and Barksdale Lumber Company (collectively, Shippers).

Under section 10907, if the parties cannot agree on a purchase price, the Board must set the purchase price at the constitutional minimum value of the line, which is defined as "not less than the net liquidation value of [the] line or the going concern value of [the] line, whichever is greater." 49 U.S.C. 10907(b). Because the 3-mile southern portion of the line near Gurdon—where the principal shipper, International Paper Company (IP) is located—was operated at a profit, but there was no profit on the rest of the line, the Board initially determined that the purchase price should consist of going concern value (GCV) of the southern portion of the line plus the net liquidation value (NLV) of the remaining portion of the line. However, the parties had established only a NLV, and not a GCV, for the line.<sup>4</sup>

To construct a GCV for the southern portion, the Board used data furnished by the Shippers and AMR, reflecting AMR's operations over the southern portion for the year 1996. The data showed that AMR realized revenues of \$425,660 and incurred variable costs of \$297,000. Applying a multiplier of 17.7% (reflecting the 1996 pretax cost of capital rate for the railroad industry),<sup>5</sup> the Board computed the GCV of the southern portion at \$726,893. (The GCV calculation did not include costs associated with rehabilitating the 3-mile southern portion of the line and did not include fixed costs.) Accordingly, the August 1999 Decision set the purchase price of the full line at \$1,628,727, consisting of a NLV of \$901,834 for the 49-mile northern portion of the line and the GCV of \$726,893 for the southern part.

AMR filed a petition for reconsideration of the purchase price set in the August 1999 Decision, claiming that the Board understated the GCV for the southern part. AMR asked the

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<sup>3</sup>(...continued)  
No. 32479.

<sup>4</sup> Indeed, in the earlier phases of the feeder line proceeding, AMR refused to provide financial data for the Norman Branch, claiming that its accounting records did not cover revenues and costs for specific branches.

<sup>5</sup> In Railroad Cost of Capital—1996, STB Ex Parte No. 558 (STB served July 16, 1997), the Board found that the after-tax railroad cost of capital for 1996 was 11.9%. The pre-tax equivalent was 17.7% (based upon 35% Federal and 2% state tax rates). The Board used the 1996 cost of capital in the August 1999 Decision because the parties' evidence was for 1996.

Board to recalculate the GCV of the southern portion of the line to reflect several cost adjustments and additional revenues it claimed for 1996.

The Shippers agreed that the purchase price should be reconsidered; they argued that the entire line should be valued at its NLV. The Shippers contended that use of a combination of NLV and GCV was contrary to the statute and to the court's decision in Caddo Antoine & Little Missouri R.R. v. STB, 95 F.3d 740 (8th Cir. 1996) (Caddo Antoine), which held that, for sale purposes, the Norman Branch must be treated as a single entity. Alternatively, the Shippers argued that the Board had made significant errors in calculating the GCV.

In the May 2000 Decision (at pp. 10-13), the Board thoroughly considered the valuation issues raised in AMR's petition and the Shippers' response. It noted that AMR normally would be entitled to the GCV for the profitable portion of the line serving IP, to compensate for the loss of IP's traffic. After carefully considering the parties' supplemental evidence, however, it concluded that the record did not contain the information needed to compute a meaningful GCV for the southern portion of the line, and that not all costs and revenues were properly accounted for in the August 1999 Decision. The Board also agreed that computing the GCV for only the southern portion may not be permissible in light of the court's decision in Caddo Antoine. Inasmuch as the parties had not provided any acceptable evidence as to GCV for the entire Norman Branch,<sup>6</sup> despite ample opportunity to provide evidence on GCV,<sup>7</sup> the Board found that the only meaningful evidence in the record of the constitutional minimum value for the line is the NLV for the entire Norman Branch. Accordingly, the Board valued the entire line at its NLV, which is \$961,096.24.

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<sup>6</sup> The Board rejected AMR's GCV estimate for the entire line because it was based on projected revenues and costs by the East Texas Railroad Company (ETC), the operator of the northern portion of the line since 1997. The Board found ETC's revenue projections irrelevant because the meaningful figure is the value of the line to AMR as a going concern, rather than the projected value of the line to the acquiring company. See May 2000 Decision at 13.

When the feeder line proceeding was reopened in 1997, the Shippers' witnesses had presented evidence that in 1993 (the last year AMR operated the entire Norman Branch) AMR's operations resulted in a negative GCV. In the August 1999 Decision, the Board rejected the 1993 data because the more current 1996 data in the record better reflected current traffic levels and demand for services. As noted in the May 2000 Decision at 13 n.29, nothing in the parties' subsequent pleadings indicated that the Board should reconsider that determination.

<sup>7</sup> The May 1997 decision reopening the feeder line case following the court's decision in Caddo Antoine specifically requested the parties to update the record for determining GCV and NLV. The parties filed GCV evidence in response to that decision and following issuance of the August 1999 Decision. As the May 2000 Decision shows, the Board accepted, and carefully considered, all of the evidence that the parties submitted.

On May 22, 2000, the Shippers notified the Board that they accepted the Board's valuation of the line.<sup>8</sup> Three days later, on May 25, 2000, AMR filed its petition to stay the closing date<sup>9</sup> for sale of the Norman Branch pending judicial review of the purchase price set in the May 2000 Decision.<sup>10</sup> AMR contends that the Board erred by failing to determine the line's GCV and that the Board did not apply the correct burden of proof. On May 30, 2000, the Shippers opposed the stay request.

## DISCUSSION AND CONCLUSIONS

The standards governing a stay request are: (1) whether petitioner is likely to prevail on the merits of the appeal; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; and (4) whether issuance of a stay is in the public interest. Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) (Virginia Petroleum Jobbers).

1. AMR Is Not Likely To Succeed On The Merits. AMR has not demonstrated that it is likely to prevail on the merits. Contrary to AMR's contention, neither the statute nor the regulations place the burden of proof of establishing GCV on the feeder line applicant. The statute is silent on the party that bears the burden to establish the line's GCV. See 49 U.S.C. 10907(b)(2).<sup>11</sup> Likewise, the regulations require only that an applicant provide "[a]n estimate of the NLV and the GCV of the line and evidence in support of these estimates," 49 CFR 1151.3(a)(4), but do not state which party bears the burden of establishing the GCV.

Indeed, the Board does not require a feeder line applicant to present any evidence of a GCV where it believes that the line it seeks to acquire is unprofitable. See, e.g., Sandusky

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<sup>8</sup> Contrary to AMR's suggestion (pet. for stay at 2, n. 2), this petition for stay is not premature. The Shippers plainly have accepted the Board's determination in the feeder line case, as the price set in the May 2000 Decision is the price the Shippers had requested.

<sup>9</sup> Under terms established in the August 1999 and May 2000 Decisions, closing is scheduled to occur on August 3, 2000 (90 days after the May 5, 2000 service date of the May 2000 Decision).

<sup>10</sup> AMR also filed a motion for leave to exceed the 10-page limit in 49 CFR 115.5(c) for petitions for stay pending judicial review. That motion is granted and the entire stay petition is accepted.

<sup>11</sup> In contrast, the statutory language places squarely on the applicant the burden to establish that the "public convenience and necessity require or permit the sale of a particular railroad line." 49 U.S.C. 10907(c)(2).

County — Feeder Line Application — Conrail, 6 I.C.C.2d 568, 571(1990); PSI Energy, Inc. — Feeder Line — Norfolk Southern Corp., 7 I.C.C.2d 227, 230 (1990).<sup>12</sup> AMR recognizes as much: “if an applicant believes the line in issue does not have a GCV, it may base its valuation evidence on the line’s NLV.” Petition for Stay at 14. Therefore, there is no basis in the statute, regulations, or precedent to support AMR’s contention that when “the owning railroad asserts a GCV and introduces evidence in support of its GCV assertion, the Board must require the applicant to prove that the NLV is greater than the GCV or rule for the railroad on the point not proven.” Id.

In finding that it could not reliably calculate a GCV for the southern portion of the Norman Branch and that the only way to value the entire Norman Branch based on the evidence before it was at NLV, the Board acted consistent with the court’s decision in Caddo Antoine and the record before us. See May 2000 Decision at 10-13. Given AMR’s inability to provide either acceptable GCV evidence or sufficient data to allow the Board to compute the GCV for the southern portion with any degree of accuracy, the Board reasonably concluded that the only reliable and verifiable evidence for the constitutional minimum value of this line was the NLV for the entire Norman Branch. Because AMR’s contentions with regard to burden of proof and GCV lack merit, and the parties have had ample opportunity to present evidence on GCV, AMR is not likely to prevail on the merits of its petition for review.

2. AMR Will Not Suffer Irreparable Harm In The Absence Of A Stay. AMR claims it will be irreparably harmed if it is required to sell the Norman Branch prior to the court’s review of the price set in the May 2000 Decision. AMR claims that it would lose substantial revenues, which will not be offset adequately, if the valuation of the line is reversed on judicial review and remanded to the Board. It asserts that the Board might then increase the purchase price of the Norman Branch, the Shippers might then decline to purchase the line at that price, and the Shippers would be forced to convey the line back to AMR in exchange for their original purchase price. In that event, AMR argues that it would have incurred unrecoverable economic losses during the interim period that the Shippers owned the line.

AMR has not shown that it would be irreparably harmed absent a stay of the closing date of the transaction. Speculation about a possible economic loss does not constitute irreparable injury. Virginia Petroleum Jobbers, 259 F.2d at 925; Consolidated Rail Corp. — Abandonment — Between Corry and Meadville, Docket No. AB-167 (Sub-No. 1129) (ICC Served Oct. 5, 1995). As the Shippers point out in their response, AMR merely presupposes that the Shippers would not agree to pay a higher amount in the event that the price set in the May 2000 Decision were overturned and the line were revalued at a higher amount. In any event, as discussed above,

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<sup>12</sup> In promulgating the feeder line regulations, the ICC explicitly recognized that it would be “inappropriate to delineate the type of evidence the parties should submit” and that the “parties are free to present any evidence of GCV or NLV that they may deem persuasive.” Feeder Railroad Development Program, 367 I.C.C. 261, 269 (1983).

it is not likely that AMR will prevail in court on its argument that the price set by the Board is too low.

AMR also has not supported its further claim that the two employees currently engaged in switching the IP facility would be irreparably harmed absent a stay. As the Shippers explain, the two employees will be offered employment by the new owners, and they would likely be available to be rehired by AMR in the unlikely event that AMR were required to reinstitute service at some later date.

Finally, AMR has failed to show that a stay of the closing date is warranted to avoid disruption of the car repair and switching operations near the IP facility pending judicial review. As the Shippers state, the car repair operations are being conducted by a third party. Those operations, which are not under AMR's control, should not be impacted by a sale. Moreover, the switching operations at IP are not complex. The Shippers have provided evidence that, prior to the embargo, it took only an hour a day to switch the loaded cars at the IP facility and one-half hour to shove the empty cars. Following the purchase of the line, those same arrangements evidently will be the rule. Because it is now taking several hours per day to switch IP, the amount of time that is spent switching at the IP facility should not be worsened, and indeed may improve, after the sale. See Verified Statement (V.S.) of Ron Finkbeiner, attached to Reply to Petition for Stay.

3. A Stay Will Adversely Impact Other Interested Parties. The Shippers are receiving rail service from ETC. However, a stay likely would delay needed rehabilitation of the Norman Branch. Following sale of the line, the Shippers expect to use the revenues generated by IP's traffic to begin rehabilitating the line, including the southern tip that carries IP's traffic. Rehabilitation would lessen the threat of derailments and improve service, thereby benefitting all shippers on the line, including IP.<sup>13</sup> On the other hand, the Shippers claim that, if AMR is allowed to retain the line pending court view, AMR would not use revenue from IP traffic to rehabilitate the entire line. In these circumstances, granting a stay, which would delay rehabilitation, would harm the shippers.

4. The Public Interest Favors Denial of A Stay. AMR claims that a stay is in the public interest because IP's operations could be disturbed if there are two line sales (one to the Shippers before judicial review and a possible reconveyance to AMR if the reviewing court requires a recalculation of the purchase price).<sup>14</sup> But IP, of course, is only one shipper. The other shippers

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<sup>13</sup> In the unlikely event that the line were returned to AMR following judicial review, even AMR would benefit from the improvements. Therefore, AMR cannot successfully claim that it would suffer unrecoverable economic losses as a result of the immediate sale to the Shippers.

<sup>14</sup> IP's verified statement specifically states that it is not concerned that the May 2000  
(continued...)

on the line favor timely consummation of the sale. Moreover, the Shippers state that they have chosen an experienced operator for the southern portion that will serve IP in the same amount of time or even more quickly than AMR's service. See V.S. Finkbeiner.

The Shippers contend that the "true public interest" is reflected in the public support submitted into the record when they filed their feeder line application in 1994. In addition, they state that denying the stay allows this feeder line proceeding to be finally resolved after six years.

On balance, the Shippers' position that the public interest favors denying the stay request is more persuasive. In the August 1999 and May 2000 Decisions, the Board determined that sale of the entire line satisfies the public convenience and necessity (PC&N) standards in section 10907(c)(1). AMR does not contest the Board's PC&N findings. Rather, the only issue it disputes is the value of the line, which was properly addressed in the May 2000 Decision.

In sum, AMR has not demonstrated that it is likely to prevail on judicial review or that it will suffer irreparable injury in the absence of a stay. On the other hand, issuing a stay would delay implementing a transaction that will provide benefits to the shipping public and provide funds for needed rehabilitation. Therefore, a stay of the closing date pending judicial review would not be in the public interest.

For the reasons discussed above, AMR's petition for stay will be denied.

It is ordered:

1. AMR's motion for leave to exceed the page limit in 49 CFR 1115.5(c) is granted.
2. AMR's petition for stay is denied.
3. This decision is effective on its service date.

By the Board, Linda J. Morgan, Chairman.

Vernon A. Williams  
Secretary

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<sup>14</sup>(...continued)

Decision may result in one change in operators. See V.S. Ron Freer, attached to stay petition.